

The Evolution of Guardianship in the Religious Culture: From Terminology to Children's Welfare

Hilyati Aulia^{1*}, Abu Hapsin², Akhmad Arif Junaidi³, Izza Himawanti⁴ and
Novita Fauziah⁵

^{1,2,3}Department of Islamic Studies, Walisongo State Islamic University, Semarang, Indonesia

⁴Department of Psychology, University of Indonesia, Depok, Indonesia

⁵Ministry of Basic Education and Culture (MoBEC), Indonesia

Article Info

Article history:

Received: November 23, 2024

Revised: January 15, 2025

Accepted: June 30, 2025

Keywords:

*Evolution, Guardianship,
Religious Culture, Children
Welfare, Terminology
Development*

ABSTRACT

This article investigates the evolution of guardianship in Islamic discourse, focusing on the tension between its traditional rigidity and emerging flexibility. Conventional interpretations, often shaped by patriarchal readings of Quranic texts, have historically assigned guardianship exclusively to men. However, contemporary legal and contextual approaches increasingly recognize women's eligibility as guardians. Using a qualitative method based on a systematic literature review, this study examines primary Quranic sources alongside family law reforms in selected Muslim-majority countries. The findings reveal a paradigmatic shift from male-centered authority to a child-centered model that prioritizes the best interests of the child. The article also clarifies the conceptual distinction between guardianship pertaining to legal and financial responsibilities- and custody, which addresses emotional and physical support. This shift reflects broader movements to ward egalitarian interpretations and universal child welfare principles within the religious culture frameworks.

© Aulia et al (2025)



This is an open-access article under the [CC BY-SA](#) license

Correspondence Address:

hilyatiaulia@gmail.com

Please cite this article in APA Style as:

Aulia, H., Hapsin, A., Junaidi, A. A., Himawanti, I., & Fauziah, N. (2025). The evolution of guardianship in the religious culture: From terminology to children's welfare. *Mimbar Agama dan Budaya*, 42(1), (106-121). [https://doi.org/ 10.15408/mimbar.v42i1.45830](https://doi.org/10.15408/mimbar.v42i1.45830)

1. INTRODUCTION

The discourse on the concept of guardianship presents two opposing perspectives. On one hand, guardianship is often viewed as inflexible due to interpretations of Quranic verses influenced by patriarchal structures (Khetia, 2014), which assign exclusive authority over a child's personal and financial affairs to men (Nigam, 2024). This rigidity is rooted in several indicators from Islamic texts (Agah, 2021), such as the appointment of male prophets (M. I. J. At-Ṭabarī, n.d.-a), the concept of *qawwamah* (male authority) (Kašīr, 1999), and the notion of male superiority in certain degrees (Az-Zamakhsharī, 1408). These views are still upheld in many Muslim countries. For instance, in Egyptian family law, the father is designated as the legal guardian with exclusive rights, while other relatives, especially mothers, are excluded from guardianship roles (Möller, 2015). Furthermore, legal texts use masculine language reinforcing male guardianship norms (Mir-Hosseini et al., 2014). However, certain Quranic verses suggest a more flexible and gender-neutral understanding of guardianship, emphasizing protection, advocacy (Shihab, 2012), and sustained support for the ward (Shihab, 2012) from God to his servants (Sanga & Reynolds, 2020). In recent years, some Muslim-majority countries have adopted more egalitarian guardianship systems. Tunisia, for example, designates guardianship as a shared responsibility between mother and father, regardless of marital status (Charrad, 2012). Algeria also allows mothers to manage educational and financial matters of their children when the father is absent or unfit (Gray, 2009). To address the theoretical gap between traditional and evolving interpretations of guardianship, this article discusses the evolution of guardianship from rigid classical terminology to more context-sensitive, contemporary perspectives.

Previous studies showed there are two main categories of the concept of guardianship; both are the traditional and the contemporary. The traditional concept is generally come from classical Islamic legal tradition (Alrebh, 2017), which placed men –such as fathers or male relatives from the paternal line- as the central authority over the personal and financial affairs of children or women under their care (Salaebing, 2019). Conceptually, this type of guardianship tends to be hierarchical and patriarchal, limiting the role of women to custody only (Chamankhah, 2017). On the other hand, the contemporary concept of guardianship has begun to explore more flexible approaches by considering the principle of the child's best interests (Noori & Torabi, 2019), by opening opportunities for women to come as guardians in specific contexts (Jémia, 2016). This categorization reflects a conceptual shift in guardianship, from an inflexible model to flexible model in order to be more responsive to social changes and society's needs. Therefore, this article becomes important in developing a more holistic understanding of guardianship's concept and offers a high degree of novelty by bridging the gap between Islamic legal tradition and the needs of modern society.

This article aims to explore the evolution of the concept of guardianship, investigating its development from traditional terminology come from traditional religious culture (Badareen, 2016) to the dynamics perspectives of modern society (Sanga & Reynolds, 2020). Traditional terminology often emphasizes male authority and legal formalism, while modern perspective often grows in the flexibility and prioritizes the best interests of the child (Elyas & Aljabri, 2020). To address this evolution systematically, author divides the discussion into three scenarios; they are identifying definitions of guardianship across various scholar traditions, distinguishing the

legal and functional boundaries between guardianship and custody, and investigating the historical of guardianship theory from pre-modern religious culture to contemporary legal reform.

The article is grounded in two primary arguments. First, the concept of guardianship is not fixed, but it depends on the capacity to develop with shifts in social, cultural, and societal contexts, in order to recognize the role of women as guardians. Women, historically, positioned at the margins. Second contemporary approaches to guardianship, guided by the best interest of the child and gender equality, offer the opportunity to challenge the traditional and patriarchal guardianship, by demonstrating these, this article contributes to bridge the gap between religious culture and the evolving need of modern society.

2. METHODS

2.1. Research Design

This study adopts a qualitative library research approach using the Systematic Literature Review (SLR) method (Pati & Lorusso, 2017) to investigate the evolution of the concept of guardianship in religious culture. The SLR method was chosen to provide a structured and comprehensive synthesis of existing studies, enabling transparent selection, evaluation, and interpretation of relevant sources. The study design is descriptive-analytical, aiming to identify conceptual patterns, legal developments, and theoretical shifts regarding guardianship across time and geographical contexts. The research is naturalistic in nature, without experimental intervention or manipulated variables (Xiao & Watson, 2019). The analysis is conducted in three phases; they are identifying and classifying definitions of guardianship, distinguishing between guardianship and custody, and tracing the historical development of guardianship theory.

2.2. Data Sources and Sampling

Data were collected from two main sources; both are peer-reviewed journal articles indexed in Scopus, using keywords such as guardianship, custody, religious culture, child welfare, and gender equality and classical and modern exegesis texts, selected based on interpretive methodology (linguistic, fiqh-based, and rational), with consideration of the socio-cultural contexts (patriarchal or egalitarian) in which they were produced. The inclusion criteria for articles are directly related to guardianship theory or practice, published within the last 10 years, available in full text and accessible online, and written in English, Arabic, or Bahasa Indonesia, while the excluded criteria are articles focusing only on custody without referencing guardianship, duplicate publications, and sources lacking theoretical relevance.

2.3. Data Collection and Analysis

The selected data were analyzed using qualitative content analysis. Each source was coded thematically according to the three scenarios of investigation. The analysis emphasizes interpretative frameworks found in Quranic verses and the implementation of guardianship principles in modern Muslim family religious culture. Comparisons across countries and *mazhab* traditions were made to identify flexibility or rigidity in guardianship interpretations.

3. RESULTS AND DISCUSSION

The results of the study show that the concept of guardianship has two consistent paths. Firstly, guardianship is defined as the authority of the father and his paternal to manage the personal and financial affairs of children. This definition reverses from the literal interpretation of Quranic verses such *QS. Al-Baqarah* (2:232); (2:233) dan *QS. An-Nisa'* (4:5), then guardianship is a static concept formulated literally without considering social change and still maintains the patriarchal structure. Secondly, guardianship opens equal opportunities for both fathers and mothers, referring to the interpretation of *QS. Al-Baqarah* (2:232) dan *QS. At-Taubah* (9:71), which emphasize shared responsibility and don't impose gender-based limitations. For fathers, guardianship applies in the ideal condition. It is happened when the male guardian meets the requirements, while the mother becomes relevant in less than ideal conditions such as in cases of paternal death or disqualification. This concept is a dynamic concept of guardianship because it considers the context of the times and goes beyond the traditional authority that limits the role of women in guardianship.

Furthermore, the findings show that there is a specific conceptual distinction between guardianship and custody. Guardianship has the legal authority over a child's to manage financial and personal decisions, while custody focuses on the physical and emotional care of the child. Despite their different legal scopes, each scope has a common and similar foundational value; it is the child's best interest. The concept of guardianship shouldn't be understood in the administrative and financial only, but also in its relationship to custody to ensure the child's best interest. Table 1 below presents a comparison of their respective roles and integrative functions.

Table 1. *distinction between guardianship and custody*

Aspect	Function	Authority Domain	Basic of Integration
Guardianship	Child protection	Personal and financial matters	The child's best interest
Custody	Child nurturing	Physical and emotional needs	The child's best interest

Historically, the guardianship theory in the 1950s was patriarchal, depending on financial and personal authority to the father, while custody was largely delegated to the mother, and tied to local schools, referring to several verses of the Quran, such as *QS. Al-Baqarah* (2:221); (2:228); (2:232); (2:233); (2:234) dan *QS. An-Nūr* (24:32). However, since 1989, the guardianship theory shifted from a patriarchal paradigm to the principle of the child's best interest. In the principle of the child's best interest, custody and guardianship are only focused on the nuclear family with the equal status. Automatically, whoever gets custody has the right to get guardianship, except in the context of a marriage guardian which still cannot be carried out by the mother. Finally, this shift shows a growing interpretation of Quranic guidance, as the main source of religious culture that centers the welfare of the child, rather than traditional gender-based authority. Table 2 presents the historical guardianship concept.

Table 2. *The historical guardianship concept*

Period	Pattern
1950s	Guardianship – Father – Bound by Local Jurisprudence Custody – Mother – Transferable to Father
1989-Present	Guardianship – Child’s Welfare – Separated from Local School Focus on Nuclear Family – Equal Function (excluding marriage guardianship)

Compared to traditional concept of guardianship, which explicitly focused on the gender based authority, which are males get exactly guardianship and women get automatically custody, this study contributes a more integrative perspective to bridge the gap. This study connects both guardianship and custody responsibilities, by using a contextual approach to the well-being of the child. This investigation offers a new theoretical construction by placing guardianship not only as an administrative or financial function, but also as a shared responsibility across genders, especially for parents. The findings of the study show that the evolution of guardianship in religious cultural isn’t only a legal or textual shift but also a socio-cultural transition from inflexibility guardianship to shared commitment in child welfare. This perspectives support the thesis that guardianship, when reinterpreted through the principle of child welfare and gender equality, becomes a flexible concept, which is relevant to contemporary era and societal needs.

3.1. Definitions of Guardianship

Although guardianship has been widely discussed across various field, its conceptual definitions remain highly heterogeneous (Goodrich, 2010). From a meta-synthesis of selected literature, guardianship is broadly described as the legal authority conferred upon an individual to represent a child in matters concerning personal welfare and financial decisions. This construct reflects both legal and normative frameworks that position guardianship as an enduring duty, even in the event of parental separation. For instance, some sources define guardianship as the authority to make decisions related to a child’s education, religion, and marriage-domains often controlled by the father as the primary legal representative. This view aligns with classical patriarchal interpretations of Islamic law (At-Ṭabarī, n.d.), where guardianship is designated as a permanent and gender-specific right (Kašīr, 1999b). Notably, Moller categorizes guardianship as a gendered institution in which males, particularly fathers or paternal relatives, hold the default position of legal guardians, thereby institutionalizing male dominance in family law systems. The convergence of legal permanence and gender exclusivity reinforces structural patriarchy in both pre-modern and contemporary Muslim legal context (Möller, 2015).

From a historical-anthropological perspective, Rook (Rook, 1998) defines guardianship as a patriarchal construct deeply rooted in ancient Israelite social systems. His analysis emphasizes that women’s legal identity and access to economic resources were contingent upon the presence of a male guardian. A woman without a husband or a male relative from her husband’s family was labeled as *almanah*, indicating vulnerability and social marginalization. This understanding of guardianship reinforces a gender-based dependency structure, when men acted as economic, legal, and social protectors. Rook’s findings illustrate how guardianship, in its traditional form, served not merely as a legal category but as a mechanism of patriarchal

social control. This aligns with Moller's view, thus consolidating the representation of guardianship as a static, male-dominated institution in both religious and secular legal context.

A more culturally embedded definition is proposed by Munro et al., who investigate the role of male guardianship in Bangladeshi society (Munro et al., 2015). Their findings underscore how guardianship extends beyond legal authority to encompass social status, moral leadership, and symbolic control (Munro et al., 2015). Men, even when physically incapacitated, continue to be seen as essential family figures because of their designation as guardians. This cultural expectation obligates men to maintain the family's honor, often by discouraging women from engaging in public work. When male guardians are absent or deceased, women and children face heightened vulnerability due to their exclusion from financial management and public representation (Munro et al., 2015). From a meta-synthesis standpoint, this case emphasizes the sociological dimension of guardianship as a culturally reinforced norms that intersects with gender, economic, security, and public agency.

In a more doctrinal context, Al-Farāsī and ar-Rūsī define guardianship primarily within the realm of marriage (Az-Zarkasyī, 1957). Guardianship is seen as the legal authority to act on behalf of another in marital contracts (Al-Qurtubī, 1964), where the guardian ensures the suitability of the union (Ar-Rūsī, 2021). While their analysis from Yemeni jurisprudence supports the prevailing view that women can't serve as marriage guardians (Ar-Rūsī, 2021), another authors acknowledge exceptional scenarios in which a woman's legal authority maybe recognized –especially in cases of social emergency or when she serves a public leader. This suggests that, although the mainstream doctrinal stance remains patriarchal, there is space within Islamic legal reasoning to accommodate contextual flexibility (Ar-Rūsī, 2021). Such findings are critical in meta-synthesis work as they show internal contradictions and evolving nuances within traditional Islamic jurisprudence.

Al-'Aufī's classification introduces a typological expansion to the definition of guardianship (Al-'Aufī, 2002). He distinguishes between general guardianship –as held by rulers or public authorities over the community- and specific guardianship, primarily assigned to a father within the family (Al-'Aufī, 2002). Specific guardianship includes responsibilities such as education, financial management, and marriage decisions (Al-'Aufī, 2002). Notably, Al-'Aufī lists detailed qualifications for a valid marriage guardian (e.g., male (Al-'Aufī, 2002), adult (Al-'Aufī, 2002), sane (Al-'Aufī, 2002), Muslim (Al-'Aufī, 2002), justice (Al-'Aufī, 2002), and freedom (Al-'Aufī, 2002)). While his stance excludes women from acting as marriage guardians, he concedes the possibility of women's legal authority in situations of necessity, such as when a woman holds political or judicial office (Al-'Aufī, 2002). This dualistic framework enhances the meta-synthesis by highlighting how legal categories of guardianship can be both restrictive and, under certain conditions, pragmatically inclusive.

Agah contributes a non-traditional and theologically enriched interpretation by redefining guardianship as a spiritual and social commitment (Agah, 2021). Drawing from the Shi'a tradition, he identifies moral and spiritual attributes –such as closeness to God (Al-Bagawī, 1997), piety (Al-Bagawī, 1997), and social responsibility- as primary indicators of a guardian (At-Ṭabarī, n.d.). Through the exemplars of the Prophet, Fatimah, and the Ahl al-Bayt, guardianship is reimagined as a mutual, non-hierarchical bond between human beings and between creation and the Creator (At-Ṭabarī, n.d.). This formulation detaches guardianship from rigid legal gender binaries and aligns it with ethical universality. In the context of meta-synthesis,

Agah's contribution is crucial for extending the discourse of guardianship beyond the legal realm into spiritual ethics and collective responsibility.

Coolidge offers a historical case study from Spanish nobility that substantiates the legitimacy of female guardianship. Her archival research uncovers that widowed mothers were often legally entrusted with both guardianship and property management for their children. These women were officially appointed through testamentary wills and held responsibility for overseeing education, administering estates, negotiating marriages, and engaging with legal institutions. The criteria for appointing female guardians included trustworthiness, competence in property law, and approval from legal authorities (Coolidge, 2005). Coolidge's work introduces empirical evidence that challenges the notion of gender-exclusive guardianship, though historically patriarchal, has been flexibly applied in different socio-legal contexts.

In highly patriarchal systems such as Jordan, Almala explores how women navigate and resist the constraints of male guardianship (Afaf Almala, 2015). Her ethnographic findings categorize these strategies into four types they are survival and adaptation (Afaf Almala, 2015), negotiation with patriarchy (Afaf Almala, 2015), economic and social networking (Afaf Almala, 2015), and open resistance with known consequences (Afaf Almala, 2015). While these actions do not always lead to systemic reform, they reveal women's agency in contesting structural limitations. These findings are significant for a meta-synthesis because they illustrate women's experiences under restrictive guardianship regimes and point to adaptive mechanisms that may influence future legal reforms.

Lybarger introduces a theological-philosophical approach by interpreting guardianship through the story of Maryam and Zakariyya. He differentiates between human guardianship (by Zakariyya) (At-Ṭabarī, n.d.) and divine guardianship (by Allah) (Lybarger, 2000). Zakariyya's role exemplifies not only physical protection but also spiritual mentoring. Simultaneously, Allah is depicted as the ultimate guardian, providing sustenance, safeguarding Maryam's sanctity, and granting her divine distinction. This model elevates guardianship to a metaphysical plane, suggesting that divine care transcends human-defined gender roles (Kaṣīr, 1419). Lybarger's theory contributes to completing the meta-synthesis by integrating scriptural theology into the gender discourse. The existence of Maryam and recited in the Quran shows that, from a theological perspective, it does not mention that there is a difference in holiness between men and women. Maryam and Zakariyya have roles: Zakariyya is Maryam's guardian, and Maryam is the child's protector in her womb.

The author sees in the lens of Adonis's static and dynamic (Boullata, 1988) that the definition of guardianship illustrates a change from an inflexibility and gender-based understanding to a more flexible and contextual concept of guardianship. Static guardianship is seen as the male's exclusive authority, especially fathers or relatives from the paternal line, in managing children's personal and financial affairs. This concept is hierarchical and patriarchal, placing men as the natural guardians of children. In many religious cultures, women are not recognized as natural guardians, and complete control over decisions related to the interests of children includes men's authority (Munro et al., 2015). However, in chronological developments, the definition of guardianship began to move slowly to the dynamic, emphasizing more flexibility and focusing on the children's welfare under guardianship. The concept of dynamic guardianship is not gender-based, but it is equal. Historical evidence from Spain shows that, in certain situations, those women can become natural guardians of children and take responsibility

for managing family property. The appointment of women as guardians is in line with several reforms in family law that have begun to recognize women, especially in non-ideal conditions where the father is absent or unqualified (Coolidge, 2005). Thus, the transformation of the concept of guardianship shows a change from a static structure to a more dynamic system, in line with the principle of the child's best interest.

3.2. Guardianship and Custody

The conceptual distinction between Guardianship and custody has long been a subject of ambiguity and inconsistent doctrines within religious culture, both of which are classical Islamic traditions and contemporary Muslim family law systems. Through a systematic review of religious culture, legal, and sociological sources and their integration via meta-synthesis, this study shows that these concepts serve functionally and normatively different purposes. In classical and modern religious culture, Guardianship generally refers to the authority granted to an adult, usually a male, to act as guardian of a child in matters requiring legal competence. These matters include important decisions related to education, medical treatment, property management, travel, marriage, and inheritance. Guardianship roles need responsibility and control (Gallala-Arndt, 2015). Conversely, custody is conceptualized as the right and duty to care for a child's physical and emotional needs, such as providing daily supervision, food, housing, clothing, affection, and general upbringing. The synthesis of legal sources from multiple jurisdictions demonstrates that Guardianship is often embedded in patriarchal assumptions of male authority and is largely immune to the nuances of custody roles typically associated with women. This dichotomy between Guardianship as public/legal authority custody as private/domestic responsibility mirrors broader gendered divisions of labor in traditional Islamic societies. In classical Islamic fiqh, these roles were explicitly separated, reflecting the assumption that men are the providers and protectors, while women are nurturers and caregivers.

Though historically widespread, such dichotomies are increasingly being challenged through modern interpretations that emphasize the child's welfare as the primary consideration over rigid gender roles (Gallala-Arndt, 2015). Within this framework, the present meta-synthesis identifies a pattern wherein the delineation between Guardianship and custody has evolved from rigid and gender-prescriptive to more fluid and functionally defined in jurisdictions adopting welfare-based legal reforms. By recognizing that both Guardianship and custody contribute jointly to the well-being of the child, legal reforms have begun to advocate for overlapping responsibilities that can be shared by both parents, depending on their competencies and the best interests of the child. From a structural standpoint, Guardianship and custody differ not only in terms of function but also in terms of temporal duration, legal weight, and gendered distribution. Guardianship is usually seen as a long-lasting and important legal role. Once someone is appointed as a guardian, their authority often continues even if the family situation changes, such as in divorce or remarriage, unless a court decides otherwise. The guardian, often the father or a male relative, has the right to make important decisions for the child, including matters like schooling, healthcare, and even marriage.

In comparison, custody is more focused on daily care and emotional support. It is often given to the parent who is seen as more nurturing, especially when the child is still young. Mothers are often chosen in many places because they are believed to be more caring and

emotionally close to the child. However, depending on local laws or customs, custody may be given to the father when the child gets older, even if the child is more attached to the mother. This change is often based on traditional ideas that men should take charge of the family. One important difference is that custodians, usually the mothers, often do not have the legal right to make big decisions, like signing papers, handling the child's money, or going to court on their behalf. These powers belong to the guardian. As a result, the custodian may be in a weaker legal position, even if she takes care of the child daily. This strict separation between the guardian and the custodian can cause problems, especially when there is disagreement between them. Based on meta-synthesis findings, it is becoming clearer that both roles are important for the child. However, keeping them too separate can make parenting and legal matters more difficult today.

Möller also presents the same explanation with an explanation of *wiṣāya*. Möller describes the differences in guardianship, custody, and *wiṣāya* in several Muslim countries, such as Egypt, Qatar, Bahrain, Algeria, Morocco, and Tunisia. Möller explains that guardianship focuses on the legal authority to make significant decisions regarding children, both personally and financially. The scope of guardianship is divided into two parts, namely *wilāya alā an-naḥs*, which includes managing the child's personal affairs such as education, health, religion, and marriage, and *wilāya alā al-māl*, which includes managing the child's property and financial assets (Möller, 2015). Usually, the responsibility for guardianship lies with a man, such as a father or other male relative, who acts as a guardian. The responsibility for guardianship also includes providing for the child, including living expenses and education needs. Guardianship is hierarchical, namely given to the father or male relative from the paternal line, and permanent until the child is legally capable.

Meanwhile, custody focuses on the physical and emotional care of the child, including providing a place to live, maintaining safety, and ensuring daily well-being. Custody has a fairly straightforward scope, namely caring for the child in everyday life without the authority to make significant decisions about the child's assets or legal affairs. Custody is usually given to the mother as the person in charge, especially during the child's childhood. However, financial responsibility does not attach to the custodian because the funds to support care are the responsibility of the male guardian. Furthermore, custody is temporary and often ends when the child reaches a certain age, for example, in Egypt, when the child is fifteen years old, or meets the criteria for no longer requiring direct care (Möller, 2015).

Then, in the discussion of guardianship, Möller added one classification, namely, *wiṣāya*. *Wiṣāya* is the appointment of a guardian by the father or the court to manage the child's affairs when the primary guardian (father) is unavailable or unable to do so. Similar to guardianship, *wiṣāya* has a scope that includes authority in financial and personal matters. *Wiṣāya* can be given to the mother, relatives, or individuals deemed qualified. *Wiṣāya* is situational and not automatic, depending on the decision of the primary guardian or the court. *Wiṣāya* is often used as an alternative when the patriarchal structure of the primary guardian is not available (Möller, 2015). So, the difference between the terms is clear, guardianship which focuses on the management and legal authority over the financial and significant aspects of the child's life, guardianship focuses more on the physical and emotional care of the child in everyday life, and *wiṣāya* is a form of guardianship given through a special appointment to replace the primary guardian in certain circumstances.

Noori and Torabi describe the differences in focus, scope, responsibilities, and characteristics between guardianship, custody, and tutorship in the Iranian legal system based on Shia jurisprudence. The construction of the legal system of guardianship, custody, and tutorship in Iran, which is different from the two previous theories, is built on the principle of the child's best interest. Guardianship focuses on legal and financial responsibilities, where the guardian, usually the father or paternal grandfather, has the authority to manage the child's assets and make significant decisions regarding the child's education or marriage (Noori & Torabi, 2019). The scope of guardianship is administrative and legal, with the limitation that every action must benefit the child; if proven detrimental, the court can revoke the authority as guardian. Custody, on the other hand, emphasizes the child's day-to-day care, including maintaining the physical, emotional, and moral well-being. This responsibility, which was initially given to the mother for young children up to a certain age, is often transferred to the father based on the age regulation. However, the court can decide otherwise if the mother better guarantees the child's interests.

Furthermore, in ideal circumstances, custody is a joint responsibility between the father and the mother (Noori & Torabi, 2019). Tutorship, however, includes additional responsibilities to protect children who do not have a natural guardian or whose natural guardian is deemed negligent. Tutorship responsibilities are comprehensive, encompassing non-financial aspects, such as security and education, and financial aspects, such as managing the child's property (Noori & Torabi, 2019). While interrelated, these three concepts have unique characteristics designed to protect the rights and welfare of the child, with strict legal oversight to ensure that the child's best interests are always a priority.

Bajpai's Across diverse legal systems examined in this review, a recurring theme emerges: the increasing centrality of child welfare indicators as a unifying evaluative framework for determining both guardianship and custody arrangements. Bajpai enumerates a comprehensive list of criteria considered by courts in India, including the economic capacity of the parent, physical and emotional safety of the child, continuity in education, health conditions, moral development, availability of extended family support, and the expressed wishes of the child especially if the child has reached a level of maturity (Bajpai, 2005). This convergence is echoed in Noori and Torabi's findings in the Iranian context, where similar evaluative parameters guide judicial decision-making, albeit within a different theological paradigm. Although different legal traditions may apply, many systems today are moving toward a shared understanding: that the real, everyday wellbeing of the child should take priority over rigid rules based on gender or family lineage. This growing similarity among legal systems highlights the influence of global frameworks like the Convention on the Rights of the Child (CRC) in shaping national laws and offering a shared language for legal reform (Noori & Torabi, 2019).

The author synthesizes from the distinction above that this shift marks one of the most important changes in guardianship and custody law in recent decades. The move away from entitlement based on lineage to a model that centers on the child's needs signals a profound change in how the law is understood. It reflects a broader trend toward legal systems rooted in rights, fairness, and social inclusion, particularly in family law, where the role of mothers and non-paternal figures is increasingly recognized in guardianship and custody. This study also highlights the importance of seeing guardianship and custody not as separate or opposing roles, but as connected responsibilities. Traditional Islamic jurisprudence often clearly separates the two guardianships linked to legal authority and custody tied to care and emotion. However, modern

legal reforms show that these roles often need to work hand in hand. For example, a mother with custody but no legal guardianship may face difficulties enrolling her child in school, applying for health insurance, or signing official documents. These legal gaps can put the child's well-being at risk, despite being in the care of a loving parent. Because of this, many scholars and advocates have called for models where guardianship and custody are shared between parents. Some countries—such as Tunisia, Indonesia, and parts of the Gulf region—have already introduced joint arrangements, especially in divorce cases. In these models, decision-making might be divided (for example, one parent handles education, the other finances) or done together under court supervision. Finally, this integrated approach better reflects the real conditions of modern families. It also fits with core Islamic values, like justice (*‘adl*), compassion (*rahmah*), and public benefit (*maṣlaḥah*). As a result, this study suggests that guardianship (*wilāyah*) and custody (*ḥaḍānah*) should no longer be seen as fixed roles based strictly on gender. Instead, they should be understood as flexible, context-sensitive duties, shaped by capability and by what is truly best for the child.

3.3. Historical Development of Guardianship Theory

The concept of guardianship has undergone significant transformation over the years. Historically, the codification of family law in several Muslim-majority countries began in the 1950s in a fragmented manner (Möller, 2015), with guardianship being shaped mainly by traditional Islamic legal thought and certain Qur'anic verses. Guardianship was commonly defined as a paternal authority, granting legal and financial control over children to male figures within the family (Al-Jasās, 1994). In 1989, guardianship policies took a global turn when the United Nations adopted the *Convention on the Rights of the Child*, which introduced the principle of the child's best interests as a guiding standard. The earliest codification of Islamic family law can be traced back to the 1917 *Ottoman Law of Family Rights*, which marked the first formal attempt to systematize family law in the Muslim world. Although this law primarily focused on issues of marriage and divorce, it emerged as a basis for future legal frameworks (Möller, 2015). Following this, countries such as Egypt, Jordan, Syria, Tunisia, and Iraq enacted family law codes in the first half of the twentieth century, particularly during the 1950s. These codes began to incorporate guardianship provisions, although often in general terms without detailed regulation. In its early stages—starting in 1917 guardianship was regulated mainly through references to local *maḥab*, which typically placed legal and financial authority over children by male guardians, such as the father or other paternal relatives. In traditional Islamic law, guardianship is divided into two main domains: the first involves legal and financial authority over the child (*wilāyah*), while the second, commonly referred to as custody (*ḥaḍānah*), pertains to the child's physical and emotional care (Möller, 2015).

Traditional guardianship, especially when combined with the concept of *qiwāmah*, is often understood as male authority over women (al-Badr, 1425). This authority is manifested through a set of interrelated norms: the obligation of a man to provide for his wife, the wife's duty to obey her husband, the husband's unilateral right to dissolve the marriage, even against the wife's will, and the father's guardianship over his virgin daughter's marriage (At-Ṭabarī, n.d.), the father can force her in nature. The patriarchal guardianship can be traced in the doctrinal formulations of pre-modern Islamic law and contemporary legal systems. This patriarchal dilemma helps

explain the persistent legislative resistance to reforming guardianship laws. When traditional perspectives emphasize the supremacy of the father and then construct guardianship as an exclusively male prerogative, it becomes a logical consequence of that patriarchal framework. Granting paternal authority over children's personal and financial affairs reinforces the perception that men are natural guardians.

In contrast, women and children are inherently vulnerable and in need of protection. Within this logic, women, considered weak and dependent, are deemed unfit to act as protectors or guardians of their children, except in cases limited to physical care, which falls under *ḥaḍānah* (custody). Similarly, when women's responsibilities are framed as domestic, managing the household and raising children, the corresponding role of the husband is positioned externally: to provide and protect. Through this provider-protector role, the husband is further justified as the legal guardian of his wife and children (Mir-Hosseini et al., 2014).

Legal reform emerged in the early modern era, particularly in the 1950s, focusing on extending the age limit for maternal custody in countries such as Egypt and Morocco. However, regulations on guardianship remained largely stagnant and continued to reflect the patriarchal tradition of Islamic law, based on specific interpretations of Qur'anic verses. In 1929, Egypt, following the Ḥanafī school of thought (Wahyudi, 2007), reversed Law No. 25 of 1929, which addressed custody rather than guardianship (Möller, 2015). This law granted mothers the primary right to custody of their sons until the age of seven and daughters until the age of nine. Later, in 1952, Egyptian law defined guardianship as a right belonging to the father. As the legal guardian, the father was given the authority to appoint a *waṣī* (designated guardian) in cases where he or the paternal grandfather was unable or unqualified to fulfill this role. The law did not recognize any other relatives, including the mother or her lineage, as eligible for the role of primary guardian.

In Egypt, and later followed by countries such as Bahrain, Qatar, and most other Muslim-majority nations, guardianship laws consistently stipulated that the father automatically assumes the role of guardian. Women were not explicitly mentioned as potential guardians unless by special appointment, and even then, such appointments remained rare in Egyptian legal practice. Even in matters related to *wilāyah alā an-naḥs* (guardianship over the person), the mother was not granted legal authority over the child despite being the custodial parent. Several decades after the initial codification of guardianship law, a significant legislative development occurred in Egypt. In 2008, a key amendment was introduced to bridge the gap between custody and guardianship. Since then, the law has allowed the custodial parent—typically the mother—to make decisions regarding the child's education and enrollment. This marked a departure from the previous framework, where such decisions fell exclusively under the father's authority as guardian (Möller, 2015). Thus, while Egypt's early guardianship system was tightly bound to local *madhhab*-based interpretations, the 2008 amendment signaled a shift: in the domain of education, guardianship rights could now be exercised by the mother, provided she held custody of the child.

A significant development occurred when the principle of the child's best interests began to be adopted into family law frameworks across several Muslim-majority countries during the post-colonial reform era. In Iran, Shia jurisprudence affirms that all decisions concerning children, whether in matters of custody or guardianship, must be guided by this principle. This standard later became a central component of global child protection policy following the

adoption of the Convention on the Rights of the Child (CRC) by the United Nations in 1989. Article 3 of the CRC emphasizes the child's best interests as the primary consideration in all legal decisions affecting children. Although many Muslim-majority countries, including Iran and India, have ratified the CRC, they have often entered reservations, particularly regarding guardianship provisions, to align the Convention with prevailing interpretations of Sharia law (Noori & Torabi, 2019).

Algeria and Tunisia are two Maghreb Muslim countries that have undertaken significant reforms in family law by aligning guardianship and custody, thereby granting both mothers and fathers balanced rights and responsibilities. In Algerian family law, two core functions in child-rearing after divorce are distinguished: custody (*ḥaḍānah*) and guardianship (*wilāyah*). According to this legal framework, custody is automatically granted to the mother, especially young children. Boys typically remain in their mother's care until age 16, while girls stay with their mother until they reach adulthood or are ready for marriage. One major exception is if the mother remarries a man who is not a *maḥram*, she may lose custody. Nonetheless, the court retains the authority to prioritize the best interests of the child and may still award custody to the mother even after her remarriage. A distinctive feature of Algeria's 2005 reform is the increased flexibility in guardianship arrangements. While guardianship was traditionally granted to the father, the reform enabled the court to determine guardianship based on the circumstances. Often, guardianship is awarded to the custodial parent, the mother (Jémia, 2016). This reform is notable for recognizing the mother as the primary caregiver and the legal guardian, a historically reserved role for the father.

On the other hand, Tunisian family law does not favor either parent in awarding custody after divorce. Instead, it mandates that custody be granted solely based on the child's best interests. When custody is awarded to the mother or father, the custodial parent also receives guardianship rights over travel (*safari*), education, and asset management. The only exception is in matters of marriage guardianship, which, under Tunisian law, applies only to minors and can only be exercised by the father. Thus, Tunisia's family law departs from the traditional rule that consistently designates the father as the default guardian. The approaches of Algeria and Tunisia toward post-divorce guardianship are significant for two reasons: first, they merge the traditionally separate roles of custody and legal guardianship; second, they allow mothers, as custodial parents, to acquire guardianship rights automatically. In doing so, both countries challenge gendered conceptions rooted in local *madhhab* traditions regarding parental roles and the distribution of authority in raising children. Ultimately, the historical development of guardianship theory reflects a significant transformation in the family law of many Muslim countries. It marks a shift from early 20th-century codifications that upheld patriarchal guardianship structures to more child-centered legal frameworks that prioritize the best interests of the child (Charrad, 2012).

In the Indonesian legal context, developments in guardianship have kept pace with those in Maghreb countries, showing similar signs of adaptation toward principles of justice and child welfare. The *Compilation of Islamic Law (Kompilasi Hukum Islam or KHI)*, enacted through Presidential Instruction No. 1 of 1991, affirms that guardianship is primarily the right and responsibility of the father as the primary guardian. However, the KHI also accommodates circumstances in which the mother or other relatives may assume guardianship, particularly when the father is absent or deemed unfit, as stipulated in Article 107. This provision indicates

that Islamic law in Indonesia has begun to allow greater flexibility in guardianship matters, aligning with the principles of *maṣlaḥah* (public interest) and the child's best interests. Further support for this child-centered approach is found in **Law No. 23 of 2002 on Child Protection**, as amended by **Law No. 35 of 2014**, strengthening the legal foundation for prioritizing the child's welfare. Article 1, paragraph (11) of the law defines guardianship as the authority of parents or other parties to represent and care for a child in all legal matters and the child's overall interests. Moreover, Article 1, paragraph (5) specifically defines a guardian as an individual or institution that, in practice, exercises parental authority over the child. These legal developments in Indonesia reflect a shift away from a rigid, patriarchal guardianship model toward a more flexible, child-focused framework. This evolution illustrates that Islamic guardianship is not inherently static but can be adapted to meet the changing social needs of contemporary society. Integrating justice-based values into Indonesian regulation offers a concrete example of how guardianship can be applied adaptively, without compromising the foundational Islamic principles that guide family law (Indonesia, 2011).

CONCLUSION

This study concludes that the concept of guardianship in religious culture has undergone significant evolution over time. Guardianship is a man's exclusive authority to manage children's personal and financial affairs. However, in its development, guardianship began to provide equal opportunities for both men and women. Distinctively, guardianship functions as legal, financial, and administrative protection for children, while custody focuses on fulfilling the physical and emotional needs. From a historical perspective, the transformation from a patriarchal system in the 1950s to a child-interest-based system since 1989 until now shows a paradigm shift from the tradition of local schools of thought, which refer to several verses of the Qur'an, to a universal concept that focuses on child welfare.

REFERENCES

- ‘Abdul Muḥsin bin Ḥamd bin ‘Abdul Muḥsin bin ‘Abdullah bin Ḥamd al-Ibād al-Badr. (1425). *Ad-Difā’ ‘an aṣ-Ṣaḥābī Abī Bakrah wa Marwiyātuḥu wa al-Istidlāl Liman’i Wilāyah an-Nisā’ ‘alā ar-Rijāl* (1st ed.). Fihrasah Maktabah al-Malik Fahd al-Waṭaniyyah.
- Afaf Almala. (2015). *Gender and Guardianship in Jordan: Femininity, Compliance, and Resistance* [University of London]. <https://eprints.soas.ac.uk/20341/>
- Agah, A. (2021). *Reclaiming Guardianship: A Critical and Constructive Reading of Walāyah in Islam*. Claremont Graduate University.
- Al-‘Auḍī, A. bin R. bin F. (2002a). Al-Wilāyah Fi an-Nikāh. In 1 (1st ed., p. 25). ‘Imādatul Bahṣi al-‘Ilmī bil Jāmi’ah al-Islāmiyyah.
- Al-‘Auḍī, A. bin R. bin F. (2002b). Al-Wilāyah Fi an-Nikāh. In 2 (1st ed., p. 207). ‘Imādatul Bahṣi al-‘Ilmī bil Jāmi’ah al-Islāmiyyah.
- Al-Bagawī, A. M. al-Ḥusain bin M. (1997a). Ma‘alim at-Tanzīl fī at-Tafsīr al-Qur’ān. In S. M. al-Ḥarsy Muḥammad ‘Abdullāh an-Namr, ‘Uṣmān Jam‘ah ḍamīriyyah (Ed.), 1 (4th ed., p. 315). Dār at-Ṭayyibah li an-Nasyri wa at-Tauzī’.
- Al-Bagawī, A. M. al-Ḥusain bin M. (1997b). Ma‘alim at-Tanzīl fī at-Tafsīr al-Qur’ān. In S. M. al-Ḥarsy Muḥammad ‘Abdullāh an-Namr, ‘Uṣmān Jam‘ah ḍamīriyyah (Ed.), 4 (4th ed., p. 139). Dār at-Ṭayyibah li an-Nasyri wa at-Tauzī’.

- Al-Jaṣāṣ, A. bin ‘Alī A. B. ar-R. (1994). *Aḥkām al-Qur’ān*. In ‘Abd as-Salām muḥammad ‘Alī Syahīn (Ed.), 1 (1st ed., p. 453). Dār al-Kutub al-‘Ilmiyyah.
- Al-Qurṭubī, M. bin A. al-A. (1964). *Al-Jāmi’ Li Aḥkām al-Qur’ān*. In I. A. Aḥmad al-Burdūnī (Ed.), 3 (2nd ed., pp. 158–159). Dār al-Kutub al-Miṣriyyah.
- Alrebh, A. F. (2017). Islamic Authority: A Matter of Guardianship. *Athens Journal of Social Sciences*, Retrieved October, 7.
- Ar-Rūsī, S. ‘Abdullah al-F. and M. M. ṣālīḥ. (2021). *اهلية المرأة في انشاء عقد النكاح, دراسة مقارنة بين الفقه الإسلامي و القانون اليمني*. *Majallah Al-Jāmi’ah Al-Waṭaniyyah*, 310.
- At-Ṭabarī, M. bin J. (n.d.-a). *Jāmi’ al- Bayān ‘an Ta’wil āyy al-Qur’ān*. In 14 (p. 347). Dār at-Tarbiyyah wa at-Turaṣ.
- At-Ṭabarī, M. bin J. (n.d.-b). *Jāmi’ al- Bayān ‘an Ta’wil āyy al-Qur’ān*. In 6 (p. 346). Dār at-Tarbiyyah wa at-Turaṣ.
- At-Ṭabarī, M. I. J. (n.d.-a). *Jāmi’ al-Bayān ‘an Ta’wil Āyy al-Qurān*. In 16 (p. 293). Dār at-Tarbiyyah wa at-Turaṣ.
- At-Ṭabarī, M. I. J. (n.d.-b). *Jāmi’ al-Bayān ‘an Ta’wil Āyy al-Qurān*. In 7 (pp. 565–566). Dār at-Tarbiyyah wa at-Turaṣ.
- At-Ṭabarī, M. I. J. (n.d.-c). *Jāmi’ al-Bayān ‘an Ta’wil Āyy al-Qurān*. In 17 (p. 623). Dār at-Tarbiyyah wa at-Turaṣ.
- Az-Zamakhsharī, A. al-Q. M. bin ‘Amrū bin A. (1408). *Al-Kasyāf ‘an Ḥaqāiq al-Qurān*. In 1 (3rd ed., p. 272). Dār al-Kitāb al-‘Arabī.
- Az-Zarkasyī, A. ‘Abdullāh B. M. bin ‘Abdullāh bin B. (1957). *Al-Burhān fī ‘ulūmil Qur’ān*. In M. A. al-F. Ibrāhīm (Ed.), 2 (pp. 68–77). Dār Iḥyā’ al-Kutub al-‘Arabiyyah ‘Isā al-Bābī al-Ḥalbī wa Syurakā’ih.
- Badareen, N. A. (2016). Shī‘ī Marriage Law in the Pre-Modern Period: Who Decides for Women? *Islamic Law and Society*, 23(4), 368–391.
- Bajpai, A. (2005). Custody and Guardianship of Children in India. *Family Law Quarterly*, 39(2), 441–457. <http://www.jstor.org/stable/25740499>
- Boullata, I. J. (1988). Adonis: Towards a New Arab Culture. *International Journal of Middle East Studies*, 20(1), 109–112.
- Chamankhah, L. (2017). *The Concept of Guardianship (Wilāya) in the Iranian Intellectual Tradition from 1800 to 1989, with Particular Reference to the Ideas of Ayatollah Khomeini*. University of Exeter (United Kingdom).
- Charrad, M. M. (2012). Family law reforms in the Arab world: Tunisia and Morocco. *New York*.
- Coolidge, G. E. (2005). Neither Dumb, Deaf, nor Destitute of Understanding’: Women as Guardians in Early Modern Spain. *The Sixteenth Century Journal*, 36(3), 673–693. <https://doi.org/https://doi.org/10.2307/20477485>
- Elyas, Tariq, & Aljabri, Abdulrahman. (2020). Representations of Saudi Male’s Guardianship System and Women’s Freedom to Travel in Western Newspapers: A Critical Discourse Analysis. *Contemporary Review of the Middle East*, 7(3), 339–357. <https://doi.org/10.1177/2347798920921977>
- Gallala-Arndt, I. (2015). Negotiating Parenthood in Muslim Countries: Changing Concepts and Perceptions. *The American Journal of Comparative Law*, 63, 819.
- Goodrich, J. K. (2010). Guardians, not Taskmasters: The Cultural Resonances of Paul’s Metaphor in Galatians 4.1-2. *Journal for the Study of the New Testament*, 32(3), 251–284. <https://doi.org/10.1177/0142064X09357677>
- Gray, D. H. (2009). WOMEN IN ALGERIA TODAY AND THE DEBATE OVER FAMILY LAW. *MERIA Journal*, 13(1).
- Indonesia, P. (2011). *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Serta Pengertian Dalam Pembahasannya*. <https://perpustakaan.mahkamahagung.go.id/assets/resource/ebook/23.pdf>

- Jémia, M. Ben. (2016). Family law, fundamental human rights, and political transition in Tunisia. In *Changing God's Law* (pp. 68–80). Routledge.
- Kašīr, A. al-F. I. bin ‘Umar bin. (1419). Tafsīr al-Qurān al-‘Aẓīm. In M. Ḥusain Syamsuddīn (Ed.), 2 (p. 30). Dār al-Kutub al-‘Ilmiyyah.
- Kašīr, A. al-F. I. bin ‘Umar bin. (1999a). Tafsīr al-Qurān al-‘Aẓīm. In S. bin M. As-Salāmah (Ed.), 2 (2nd ed., p. 292). Dār at-Ṭayyibah li an-Nasyri wa at-Tauzī‘.
- Kašīr, A. al-F. I. bin ‘Umar bin. (1999b). Tafsīr al-Qurān al-‘Aẓīm. In S. bin M. As-Salāmah (Ed.), 1 (2nd ed., p. 631). Dār at-Ṭayyibah li an-Nasyri wa at-Tauzī‘.
- Khetia, V. (2014). The Guardians of the Islamic Marriage Contract and the Search for Agency in Twelver Shi‘a Jurisprudence. In Z. A. Shah (Ed.), *Ifta’ and Fatwa in the Muslim World and the West* (pp. 129–172). International Institute of Islamic Thought. <https://doi.org/10.2307/j.ctvkc670w.11>
- Lybarger, L. D. (2000). Gender and Prophetic Authority in the Qur’anic Story of Maryam: A Literary Approach. *The Journal of Religion*, 80(2), 240–270. <http://www.jstor.org/stable/1206235>.
- Mir-Hosseini, Z., Al-Sharmani, M., & Rumminger, J. (2014). *Men in charge?: rethinking authority in Muslim legal tradition*. Simon and Schuster.
- Möller, L.-M. (2015). An Enduring Relic: Family Law Reform and the Inflexibility of Wilaya. *The American Journal of Comparative Law*, 63(4), 893–925.
- Munro, J., Patterson, P. B., & McIntyre, L. (2015). “Your father is no more”: Insights on guardianship and abandonment from ultrapoor women heads of household in Bangladesh. *Women’s Studies International Forum*, 53, 43–52. <https://doi.org/https://doi.org/10.1016/j.wsif.2015.09.005>
- Nigam, S. (2024). Guardianship Law in India: Examining the Principle of ‘Best Interests’ of Minors and the Rights of Single Mothers as Sole Guardians. *Indian Journal of Gender Studies*, 31(3), 308–327. <https://doi.org/10.1177/09715215241262137>
- Noori, S. M., & Torabi, M. (2019). The Principle of Protecting the Best Interests of the Child in Shia Jurisprudence and Iran’s Legal System with Emphasis on Custody (New Understanding of a Traditional Legal Concept). *Asian Journal of Legal Education*, 6(1–2), 67–82. <https://doi.org/10.1177/2322005819841525>
- Pati, D., & Lorusso, L. N. (2017). How to Write a Systematic Review of the Literature. *HERD: Health Environments Research & Design Journal*, 11(1), 15–30. <https://doi.org/10.1177/1937586717747384>
- Rook, J. (1998). When Is a Widow Not a Widow? Guardianship Provides an Answer. *Biblical Theology Bulletin*, 28(1), 4–6. <https://doi.org/10.1177/014610799802800102>
- Salaebing, M. (2019). *Male Guardianship Over Women in the Healthcare Context: An Islamic Approach*. Hamad Bin Khalifa University (Qatar).
- Sanga, K., & Reynolds, M. (2020). Knowledge guardianship, custodianship and ethics: a Melanesian perspective. *AlterNative: An International Journal of Indigenous Peoples*, 16(2), 99–107. <https://doi.org/10.1177/1177180120917481>
- Shihab, M. Q. (2012a). Tafsir Al-Misbah Pesan, Kesan, dan Keserasian al-Quran. In 5 (5th ed., p. 450). Lentera Hati.
- Shihab, M. Q. (2012b). Tafsir Al-Misbah Pesan, Kesan, dan Keserasian al-Quran. In 1 (5th ed., pp. 671–672). Lentera Hati.
- Wahyudi, M. I. (2007). Membaca Ulang Konsep Perwalian Dalam Perspektif Mohammed Arkoun. *Musawa: Jurnal Studi Gender Dan Islam*, 5.
- Xiao, Y., & Watson, M. (2019). Guidance on conducting a systematic literature review. *Journal of Planning Education and Research*, 39(1), 93–112.